No. 83-6090

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

MICHAEL GENE BERRYHILL,

Petitioner,

vs.

ROBERT FRANCIS, Warden,
Georgia Diagnostic and
Classification Center

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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QUESTIONS PRESENTED

I. Whether stricter procedural and substantive standards should be applied by trial courts in determining whether to grant a change of venue motion upon the retrial of a capital case?

II. Whether a venireman irrevocably committed to Imposition of the Death Penalty must be excused for cause?

III. By what constitutional standard should claims of ineffective assistance of counsel be measured?

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Petitioner Michael Gene Berryhill respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia in this case.

CITATION TO OPINION BELOW

The unreported opinion of the Superior Court of Butts County, Georgia and the orders of the Supreme Court of Georgia are annexed hereto as Appendices A - C.

JURISDICTION

The judgment of the Supreme Court of Georgia was rendered on September 28, 1983. A timely petition for rehearing was denied on October 18, 1983. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3), petitioner having asserted below and asserting herein deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...and to have the Assistance of Counsel for his defence;"

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner, Michael Gene Berryhill, seeks a writ of certiorari from this Court to the Supreme Court of Georgia to review a decision of that Court upholding the denial of his petition for a writ of habeas corpus which challenged his convictions and sentence of death.

Petitioner asserted in his habeas corpus petition in the Superior Court of Butts County, Georgia, that he was being detained wrongfully by the respondent pursuant to convictions of armed robbery and murder and a sentence of death imposed upon him by the state of Georgia in violation of his rights guaranteed by the Constitution of the United States. He sought to vacate his convictions and sentence of death alleging, inter alia, that he was denied his right to a fair trial before an impartial jury and the effective assistance of counsel at trial as well as at the penalty phase of his capital trial.

George C. Hooks, Jr. was a prominent businessman and civic leader in the south central Georgia town of Cartersville, Georgia. His murder in 1974 received extensive publicity in the Cartersville and Bartow County press. The eventual arrest of a suspect

and later developments in the case were given wide publicity. The Bartow County Herald Tribune of November 27, 1974, for example, included a front page, headline article announcing the arrest of Michael Gene Berryhill and another article listing the members of the traverse jury who would try him for murder. Widespread publicity attended petitioner's Bartow County trial, including detailed accounts of the facts alleged by the State as well as the testimony of most witnesses. On January 9, 1975, petitioner was convicted of felony murder and armed robbery. The following day he was sentenced to die by electrocution. The Supreme Court of Georgia affirmed. Berryhill v. State, 235 Ga. 549, 221 S.E.2d 185 (1975) and this Court subsequently denied a petition for certiorari. Berryhill v. Georgia, 429 U.S. 1054 (1977).

After an unsuccessful attempt to obtain state habeas corpus relief, see Berryhill v. Ricketts, 242 Ga. 447, 249 S.E.2d 197 (1978), cert. denied, 441 U.S. 967 (1979), the United States District Court for the Northern District of Georgia granted petitioner habeas corpus relief on May 13, 1980, reversing his convictions and sentence.

Petitioner was subsequently re-indicted in Bartow County for the same offense. In June of 1981, jury selection began for his retrial. Petitioner filed a timely motion seeking a change of venue from the small rural county in which he had previously been tried, convicted, and sentenced to death. The trial judge chose to delay a ruling on the motion until after the voir dire was complete. Petitioner sought to strengthen his change-of-venue motion by the introduction into evidence of a public opinion poll. Petitioner produced as witnesses the experts who conducted the poll, and filed a memorandum in support of his motion. The trial judge refused to allow the poll as evidence bearing upon the change of venue issue. Petitioner also filed a motion for an

individual sequestered voir dire. The trial court permitted individual voir dire but refused to permit sequestration.

An examination of the voir dire reveals that of the 102 prospective jurors called, 59 veniremen were individually examined. Although the first trial had occurred six years before the re-trial, 78 percent of those individually examined remembered reading or hearing the facts of the case, including the previous verdict. Moreover, 42 percent said they had heard friends or neighbors express opinions that the petitioner was guilty. Forty-two percent also stated or implied that they too felt petitioner was guilty. Some jurors were quite frank about their bias:

> "Q. Do you have an opinion here today as to which side shall win this case based on what you have heard up until now? When I say "which side" I mean either the State or the Defendant?
>
> Mr. Curtis: Well, if he did it the State will win.
>
> Q. All right, but do you have an opinion yet as to whether or not the Defendant is guilty or whether or not he did it?
>
> Mr. Curtis: He must have did it. If he didn't he wouldn't be in here."
>
> (Trial Transcript, 295-96)

An exchange with another prospective venireman was similar:

> "Q. All right, based on what you and I have just talked about rather generally as far as conversation of people which involves discussing the facts, discussing opinions, guilt or innocence and what punishment is appropriate, based on all three of those things do you think you have found an opinion in your mind as to whether or not he is innocent or guilty?
>
> Mr. Dye: I did at the beginning.
>
> Q. Do you still have that opinion in your mind?
>
> Mr. Dye: I will have that opinion until the defense proves otherwise."

A third exchange exemplifies the attitudes of many prospective jurors:

"Q. Have you had consultations with your friends and family about the case?

Mr. Herrin: Yeah, it has been discussed.

Q. All right, has it been constantly or fairly well spread out since the original incident or was it at one particular time?

Mr. Herrin: I think it was, more or less, when it first happened and then when the situation came up where they were going to have to have a new trial here there was some discussion about it then.

Q. Talk flared up on it again?

Mr. Herrin: Uh-huh [yes].

Q. Now in these conversations that you have had with people, have people expressed their opinions to you as to his guilt or innocence?

Mr. Herrin: Yes.

Q. And what were those opinions?

Mr. Herrin: Guilty.

Q. Any opinion been expressed to you as to what punishment he should get?

Mr. Herrin: Yes.

Q. What were those opinions?

Mr. Herrin: The electric chair.

Q. Now based on your hearing all these opinions have you formed an opinion in this case as to guilt or innocence?

Mr. Herrin: No sir. You know, I'm like Mr. Summey. I think when the first trial, there was something to it that he was convicted, and then due to some legal technicality, as I understand it, is the reason we are up here again."

(Trial Transcript, 210-11)[1/]

[1/]While the two former veniremen were excused for prejudice, the latter was not, the trial judge having accepted the jurors' declaration of impartiality. The court's refusal to strike such jurors was not rare. Although 42 percent of the veniremen stated or implied an opinion as to the petitioner's guilt, only 8 percent were excused because of prejudicial opinions as to guilt.

On June 2, 1981, venireman Herschell F. Higgins was called for voir dire examination (Trial Transcript at 627). Mr. Higgins asserted that he was definitely in favor of the death penalty and that he would always vote to impose the death penalty in every case where life was taken and the law permitted a sentence of death. (Trial Transcript at 635). When questioned by the trial court as to whether he would consider the evidence under the law as charged by the judge, Mr. Higgins stated he would but again asserted that he would vote for the death penalty if the law allowed it (Trial Transcript at 636). The frank answers of Mr. Higgins when asked whether there might be circumstances when a person convicted of murder should receive a life sentence reveal an unwavering bias in favor of execution.

"Mr. Higgins: If that person has taken life he should be responsible for it. He should be -- If the facts proved in evidence that he did the murder I would vote for it.

Defense Counsel: In every circumstance.

Mr. Higgins: If the facts were there according to state law.

Defense Counsel: Even if the law would direct you to the contrary would you return a death sentence in every case? If the law gave you the chance to go one way or the other you always impose the death penalty?

Mr. Higgins: If there was a life involved, yes, sir."

(Trial Transcript at 637)

The voir dire resulted in the selection of a jury of twelve, eleven of whom knew the facts of the case and three of whom had an opinion as to petitioner's guilt. Following their selection, petitioner renewed his motion for a change of venue. The motion was denied and the trial began fifteen minutes later (Trial Transcript, at 818).

At the trial on the issue of petitioner's guilt or innocence, the jury heard evidence that, on October 7, 1974, petitioner, a Cobb County resident, drove to Dalton, Georgia to investigate purchasing an automobile (Trial Transcript 1083-85). On the way back he stopped in Cartersville to visit Jerry Ray Lane (Trial Transcript 897, 1085). Together they picked up an acquaintance of Mr. Lane's named Allen Vaughn whereupon the three proceeded to Marietta and obtained some guns (Trial Transcript 897, 898, 1087). The group returned to Cartersville hoping to sell the guns. One weapon was so disposed (Trial Transcript 1087-1088). Mr. Vaughn was dropped off and did not figure in the events to follow (Trial Transcript 1089). With Mr. Lane, petitioner then travelled to a local store where he purchased ammunition (Trial Transcript 1089, 1090). The two rode around burglarizing several homes during the evening (Trial Transcript 1091). During most of the day and evening Petitioner was drinking wine and sniffing a substance called "Blair" (Trial Transcript 1083, 1088, 1091). Later in the evening, Mr. Lane and petitioner picked out a house at random to burglarize, the house of Mr. George C. Hooks, Jr. (Trial Transcript 1093). Mr. and Mrs. Hooks were at home with their two children when the following events occurred as related by Mrs. Hooks.

The doorbell rang at about 10:30 p.m., and Mr. Hooks went downstairs (Trial Transcript 846-847). Mrs. Hooks heard conversation, then the sound of breaking glass and other noise. Mr. Hooks called to her to telephone the police, which she did (Trial Transcript 847-848). Mr. Hooks then ran into the bedroom and closed the door (Trial Transcript 848). A shot came through the door (Trial Transcript 849). Mr. Hooks stumbled into the hall. Id. Mrs. Hooks saw an intruder wearing a stocking mask and holding a gun (Trial Transcript 850). The intruder began demanding money (Trial Transcript 851). The intruder then

entered the bedroom, tore out the telephone and came back into the hall while Mrs. Hooks looked for money (Trial Transcript 851-852). The intruder then shot Mr. Hooks as he lay on the floor (Trial Transcript 852). Mrs. Hooks led the intruder down the stairs, found some money and gave it to him (Trial Transcript 853). As she was being led back up the stairs, the intruder called out a name and th n ran out the door (Trial Transcript 853-854).

Thereafter the police and an ambulance arrived (Trial Transcript 872, 938). Mr. Hooks died in the hospital a short time later. Both Mrs. Hooks and her son, Steven Hooks, identified petitioner in court as the intruder (Trial Transcript 855, 870).

Taking the witness stand in his own defense, petitioner testified that he had been sniffing first glue, and then Blair (a plastic aerosol spray used by artists) since he was about thirteen years of age (Trial Transcript 1083). On the day of the incident petitioner had been drinking wine and sniffing Blair throughout the day and evening (Trial Transcript 1083, 1088, 1091). petitioner further testified that he and Mr. Lane had chosen the Hooks' home to burglarize at random and that they were going to ring the doorbell and burglarize the residence only if no one was home (Trial Transcript 1094). Petitioner testified to his difficulty in remembering exactly what occurred since he had trouble separating his actual recollection from what he had since heard had actually happened (Trial Transcript 1095). Petitioner recalled ringing the doorbell and remembered seeing Mr. Hooks come down the stairs as well as breaking the glass panes around the door (Trial Transcript 1095, 1097). He remembered seeing Mr. Hooks on the floor leaning against the wall, seeing the boy, Steven Hooks, in the hallway, and demanding money of Mrs. Hooks (Trial Transcript 1096, 1098). Petitioner testified that the child reminded him of his cousin, and startled, he turned to leave when Mr. Hooks

reached up for petitioner and the gun went off (Trial Transcript 1098). Petitioner testified that he did not intend to kill Mr. Hooks (Trial Transcript 1100). Petitioner left the house and discovered Mr. Lane had left in the car (Trial Transcript 1099). He wandered around town until he located the Lane house where he spent the night (Trial Transcript 1099).

Petitioner returned home and soon thereafter left the state. Following his November, 1974, apprehension by State of Missouri authorities, petitioner was returned to Georgia (Trial Transcript 1131).

The jury rejected petitioner's defense of insanity and found him guilty of felony murder and armed robbery (Trial Transcript 1294).

During the sentence phase, the State introduced in aggravation petitioner's criminal record and a film interview with petitioner while in prison (Trial Transcript 1131-1315). In mitigation, petitioner introduced a second film interview with petitioner and nine witnesses, including himself, who testified to petitioner's conversion to Catholicism and his exemplary behavior while in prison (Trial Transcript 1318-1410).

During its deliberations at the sentencing phase, the jury returned to the courtroom three times for additional information indicating that they were deadlocked (Trial Transcript 1492, 1496, 1501, 1503). After twenty-seven (27) hours, a verdict was rendered sentencing Petitioner to death by electrocution (Trial Transcript 1506).

The Supreme Court of Georgia affirmed petitioner's conviction and sentence of death on May 18, 1982. Berryhill v. State, 249 Ga. 442, 291 S.E. 2d 685 (1982). Petitioner thereafter filed a timely Petition for Writ of Certiorari before the United States Supreme Court which was denied on November 1, 1982. Berryhill v. Georgia, ___ U.S. ____, 103 S.Ct. 317, 74 L.Ed. 2d 293 (1982).

The Petition for Rehearing was denied on January 10, 1983. Berryhill v. Georgia, ____ U.S. ____, 103 S.Ct. 773, ____ L.Ed.2d ____ (1983).

Michael Berryhill's petition for a writ of habeas corpus was heard on February 14, 1983 and was denied by order of the Superior Court of Butts County, Georgia, filed on August 3, 1983. Appendix A.

Petitioner's timely application for a certificate of probable cause was denied by the Supreme Court of Georgia on September 28, 1983. Appendix B. Rehearing was denied by the Georgia Supreme Court on October 18, 1983. Appendix C.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. Prior to his retrial, petitioner filed a "Motion for Change of Venue." The trial judge delayed a ruling until after voir dire. On June 3, 1981, after the selection of the jury, petitioner argued to the trial court that this motion should be granted, since prejudicial pre-trial publicity had endangered his constitutional right to a fair trial by an impartial jury (Trial Transcript 812-814). Petitioner was allowed to place into the record several newspaper articles about the petitioner's trial history. These articles were introduced in order to show community prejudice. Petitioner also introduced a set of satistics summarizing the results of the voir dire in an effort to show the actual prejudice of the veniremen and jurors. The trial judge denied the motion for change of venue, because he felt the news articles alone were insufficient evidence of community prejudice, and because most veniremen with opinions as to petitioner's guilt said that they could lay their opinions aside. As discussed above, the trial judge refused to consider a public opinion poll in his deliberations on the venue motion.

On May 29, 1981, petitioner moved for an opportunity to introduce the results of a public opinion poll, conducted by the University of Georgia School of Journalism in support of his change of venue motion. The motion was denied and the poll excluded even though expert pollsters indicated that the poll was statistically reliable and consistent with professional ethics and practices. (Transcript of Hearings of May 25, 1982, at 23-41, and May 29, 1982 at 5-43). Petitioner contended that the poll demonstrated the high level of community prejudice against him and therefore should have been admitted into evidence at the venue hearing. Since the judge did not allow authentication or admittance of the poll, he failed, in effect, to protect the petitioner's right to due process and his right to trial by an impartial jury.

On appeal, petitioner alleged in his Enumeration D that the trial court erred in refusing to grant appellant's motion for change of venue and erred in failing to consider the results of the poll. Petitioner argued that the circumstances of this case were inherently prejudicial to his Sixth Amendment right to an impartial jury. The Georgia Supreme Court disagreed, holding that "motion for change of venue lies within the sound discretion of the trial judge" and that no abuse of discretion existed in this case. The Georgia Supreme Court further ruled that even if the poll had been considered petitioner would not have been entitled to a change of venue.

Petitioner alleged in paragraphs 21-27 of his petition for a writ of habeas corpus that the trial court's failure to grant a change of venue violated his right to a fair trial before an impartial jury. The Superior Court relied on the findings of fact and conclusions of law of the Georgia Supreme Court in denying relief. Berryhill v. Francis, A-10.

2. Petitioner's trial counsel's motions to strike Mr. Higgins for cause were thrice denied (Trial Transcript at 635-36; 637-38; 638). On appeal, petitioner alleged in his Enumeration F that he must be granted a new trial for the trial court's refusal to strike for cause a prospective juror irrevocably committed to a sentence of death in all cases where a life has been taken, regardless of the evidence.

The Georgia Supreme Court disagreed on the basis of the prospective juror's response "...that he would follow the law and evidence..." despite the venireman's there repeated assertion that he would nevertheless vote for the death penalty if the law allowed it.

Petitioner alleged in paragraph 30 of his petition for a writ of habeas corpus that he was denied a fair trial by the court's refusal to strike for cause a venireman irrevocably commited to the death penalty. The Superior Court relied on the conclusion of the Georgia Supreme Court in denying relief. Berryhill v. Francis, A-11.

3. Petitioner alleged in paragraphs 18-20 of his petition for a writ of habeas corpus that he was denied the effective assistance of counsel both at the trial and sentencing phases of his trial. The Superior Court held that petitioner was provided effective assistance of counsel applying the standard set out in MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960), cert. denied, 368 U.S. 877 (1961), and Pitts v. Glass, 231 Ga. 638, 203 S.E.2d 515 (1974): "...not errorless counsel and not counsel judged ineffective by hindsight but counsel reasonably likely to render and rendering reasonably effective assistance." Berryhill v. Francis, A-6. The Superior Court cited generally, Washington v. Strickland, but made no comment concerning the conflict in standards, setting forth only the Georgia standard. Cf. A-6 and A-7.

REASONS FOR GRANTING THE WRIT

I.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER MORE CAREFUL STANDARDS SHOULD BE APPLIED BY LOWER COURTS IN RESOLVING CHANGE-OF-VENUE MOTIONS UPON THE RETRIAL OF A CAPITAL CASE

A. In Light Of The Risk Of Substantial Prejudice, More Careful Standards Should Govern Change-Of-Venue Requests In Capital Cases

This Court has long recognized that excessive pretrial publicity can have a prejudicial effect upon jurors in a criminal trial. See, e.g., Irvin v. Dowd, 366 U.S. 717 (1961); Rideau v. Louisiana, 373 U.S. 723 (1963); Estes v. Texas, 381 U.S. 532 (1965); Sheppard v. Maxwell, 384 U.S. 333 (1966). The Court in each of these prior opinions has cautioned that pretrial accounts of a case can create a wave of public passion inherently prejudicial to a defendant. However, in Murphy v. Florida, 421 U.S. 794 (1975) this Court held that in order for a petitioner to show that he was deprived of a fair trial by an impartial jury, he must ordinarily "show that the setting of the trial was inherently prejudicial or that the jury selection process of which he complains permits an inference of actual prejudice." 421 U.S. at 803. Murphy has led many judges to conclude that prejudicial conditions do not exist unless news publicity has been wildly inflammatory; and thus factual news articles have not been perceived as increasing the level of public passion. See, e.g., Mooney v. State, 243 Ga. 373, 254 S.E.2d 337 (Ga. 1974), State v. Sunday, 609 P.2d 1188 (Mont. 1980), State v. Sonnier, 379 So.2d 1336 (La. 1979), Commonwealth v. Rolison, 374 A.2d 509 (Pa. 1977). Under Murphy, some trial courts have disregarded the fact that even factual information can nurture a subtle, yet pervasive community prejudice which deprives a

defendant of his Sixth and Fourteenth Amendment rights.

This problem is particularly acute in the retrial of capital cases, where a community may well have been exposed not only to the facts of the case, but also to a jury's judgment on the appropriate sentence to be employed. The knowledge that a jury had previously sentenced the same person to death will lead some veniremen to form a strong opinion as to the appropriate punishment which the community should impose:

> "With such an opinion permeating their minds, it would be difficult to say that each could exclude this preconception...from his deliberations. The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man." Irvin v. Dowd, supra, 366 U.S. at 727.

Thus when a capital juror is asked on retrial whether he or she can lay aside their opinions and render a verdict based on the evidence, as the law requires, an affirmative response is not necessarily true. As the Court stated about similar jurors in Irvin v. Dowd, supra, 366 U.S. at 728,

> "No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father."

This Court has previously insisted that trial courts ensure that a defendant not be unfairly disadvantaged by community prejudice:

> "Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighted against the accused." Sheppard v. Maxwell, supra, 384 U.S. at 362 (emphasis supplied).

On the retrial of a capital case, a stricter standard is required to ensure that prejudicial attitudes will not deny the accused a fair trial by an impartial jury or deprive him of his life without due process of law. See generally, Gardner v. Florida, 430 U.S. 349 (1977); Beck v. Alabama, 447 U.S. 625 (1980). Petitioner submits that when prospective jurors state

that they have opinions as to a defendant's guilt, have knowledge of the prior sentencing verdict in the case, or have knowledge of a community presumption of the appropriate sentence, community prejudice should be presumed. Similarly, where a public opinion poll or other social science evidence indicates such community attitudes, prejudice should be presumed.

B. If A Showing Of Actual Prejudice Is Required To Obtain A Change Of Venue In The Retrial Of A Capital Case, Then Trial Courts Should Admit Scientifically Reliable Public Opinion Polls Into Evidence

Currently, no uniform judicial standards govern the circumstances in which public opinion polls should be admitted in criminal proceedings. 76 ALR 2d 632 §11.

However, where a defendant is being retried for a capital offense, reliable, scientifically gathered information about community prejudice is highly relevant to whether venue should be changed. To ignore reliable social science evidence that community prejudice exists is equivalent to an abandonment of the judicial duty to protect a defendant's right to due process of law and a fair trial by an impartial jury. As Justice Black has stated:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness."
> Re Murchison, 349 U.S. 133, 136 (1955) (emphasis supplied).

Thus, if the Court were to hold that defendants, in the retrial of capital cases, must show actual prejudice before a change of venue is required, then trial courts should be required to admit statistically reliable public opinion polls into evidence at change of venue hearings.

II.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER A VENIREMAN IRREVOCABLY COMMITTED TO IMPOSITION OF THE DEATH PENALTY MUST BE EXCUSED FOR CAUSE

This Court has long recognized that a venireman should be excused for cause if from his responses during voir dire it is reasonably certain that in the event of conviction for a capital offense, he would render no verdict at the punishment phase of trial other than one requiring execution. Stroud v. United States, 251 U.S. 15, 20-21 (1919).

More recently, in Witherspoon v. Illinois, 391 U.S. 510, 522 (1968), this Court held that

> "...a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction."2/

The rule in Witherspoon requires that a venireman "...be willing to consider all of the penalties provided by state law, and that he not be irrevocably committed..." to a sentence of death. Id. at fn. 21 (emphasis in original). Only those prospective jurors opposed to the death penalty in all circumstances, regardless of the evidence must be excused for cause. Ibid. In Davis v. Georgia, 429 U.S. 122 (1976) this Court held that to exclude one venireman on grounds at variance with the Witherspoon standard was fatal, even though the government may have gone to trial with one peremptory challenge unexercised. See also, Burns v. Estelle, 592 F.2d 1297, 1300 (5th Cir. 1979), Aff'd, 626 F.2d 396 (1980) (en banc).

2/ The doctrine announced in Witherspoon applies with equal force to bifurcated capital sentencing procedures. Adams v. Texas, 448 U.S. 38, 45, 49-50 (1980).

The Witherspoon rationale that one who is irrevocably committed prior to trial cannot be a fair and impartial juror as required by the Sixth Amendment must be applied with at least as great force where a venireman is irrevocably committed to a sentence of death as in the case of a prospective juror unalterably opposed to such a penalty. To say otherwise would defeat the constitutional command of impartiality by favoring death prone tribunals over those favoring life imprisonment.

A grant of certiorari is called for here as the Decision of the Georgia Supreme Court conflicts with decisions of other state and federal courts which have considered this question.

The following passage from Witherspoon v. Illinois, supra, 391 U.S. at 522 fn. 20, reveals the United States Court of Appeals for the Fourth Circuit's conflict with the decision of the Georgia Supreme Court:

> "...the decision whether a man deserves to live or die must be made on scales that are not deliberately tipped toward death. It was in part upon such a premise that the Fourth Circuit recently invalidated a North Carolina murder conviction, noting that a juror who felt it his "duty" to sentence every convicted murderer to death was allowed to serve in that case, "while those who admitted to scruples against capital punishment were dismissed without further interrogation." This "double standard", the court concluded, "inevitably resulted in [a] denial of due process." Crawford v. Bounds, [395 F.2d 297, 303-304 (4th Cir. 1968), cert denied, 397 U.S. 936 (1970)].

Similarly, a number of decisions from the State of Texas are in conflict with the decision of the Georgia Supreme Court. In Smith v. State, 573 S.W.2d 763, 766 (1977) the court ruled that denial of a defendant's challenge of a prospective juror for cause in a death penalty case required reversal where voir dire examination revealed the juror held strong convictions that death was the only punishment appropriate for one convicted to taking another's life, even though the juror said he was willing to require the government to prove beyond a reasonable doubt each

issue submitted at the punishment stage. And in Cuevas v. State, 575 S.W.2d 543, 546 (1979), the Court held that where, although the prospective juror stated that he could base his answers on evidence, his previous statements showed unwillingness to consider life imprisonment, as opposed to capital punishment, unless defense of insanity was proven, defendant's challenge for cause in a homicide prosecution, was improperly overruled, and reversal of conviction was required. The recent case of Pierce v. State, 604 S.W.2d 185 (1980) also supports the constitutional deprivation argued here as it considers a venireman who freely and unambiguously stated he would consider no punishment other than death. Reversal was required for the trial court's refusal to strike for cause.

The decisions of the California Supreme Court are also in conflict. See Hovey v. State, 168 Cal. Rptr. 128, 616 P.2d 1301, 1310 (1980)(Jurors who would automatically vote for the death penalty must be removed for cause) relying on People v. Hughes, 52 Cal. 2d 89, 94-95, 17 Cal. Rptr. 617, 367 P.2d 33, 36 (1961) (Immutably established opinion in favor of invariably selecting the death penalty establishes actual bias supporting a challenge for cause). This Court should, accordingly, grant review of this case to resolve the conflict arising from divergent appellate decisions concerning jury selection in death penalty cases.

When a prospective juror professes an absolute opinion in favor of the imposition of the death penalty in a capital case, "...he could appropriately be described as prosecution-prone and would properly have been struck for cause." Spinkellink v. Wainwright, 578 F.2d 582, 594 (5th Cir. 1978) citing, inter alia, Witherspoon v. Illinois, supra, 391 U.S. at 521; and, Stroud v. United States, supra, 251 U.S. at 20-21.

III.

THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHAT CONSTITUTIONAL STANDARD SHOULD BE APPLIED TO CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL

This Court should issue a writ of certiorari to decide a question of fundamental importance to the administration of criminal justice in both state and federal courts: what standard of competency of defense counsel is required in capital cases in order to satisfy the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

In two cases docketed last term this Court has granted certiorari on very similar questions concerning the standards for evaluating claims of ineffective assistance of counsel.[3/] Argument was heard in those cases on January 10, 1984. Petitioner requests that this Court grant certiorari and defer consideration of this case pending issuance of opinions in Washington and Cronic.

Although this Court has observed that the Sixth Amendment's right to counsel includes the right to effective assistance "within the range of competence demanded of attorneys in criminal cases", McMann v. Richardson, 397 U.S. 759, 771 n. 14 (1970), it left determination of this range of competence to the "good sense and discretion of trial courts." Id.

3/ Washington v. Strickland, 693 F.2d 1243 (11th Cir. 1982)(en banc), cert. granted, 33 Cr. L. Rep. 4073 (U.S. June 6, 1983) (question presented whether court of appeals, in expressly overruling Florida Supreme Court and expressly rejecting en banc opinion of another federal court of appeals, United States v. DeCoster, 624 F.2d 196 (D.C. Cir. 1976), cert. denied, 444 U.S. 944 (1979), applied correct standard for review of claims of ineffective assistance of counsel).

United States v. Cronic, 675 F.2d 1126 (10th Cir. 1982), cert. granted, 75 L.Ed.2d 430, 32 Cr. L. Rep. 4193 (February 22, 1983) (question presented whether court of appeals correctly reversed defendant's convictions on ground that he did not receive effective assistance of counsel at trial, without identifying any act or omission by counsel that departed substantially from what reasonably competent criminal defense attorney would have done under circumstances and without finding any prejudice to defendant).

The Supreme Court of Georgia, in deciding petitioner's claim of ineffective assistance of counsel, applied the standard it had previously adopted[4/] and which is utilized by the United States Court of Appeals for the Fifth Circuit:[5/] counsel reasonably likely to render and rendering reasonably effective assistance. This standard appears to be in conflict with the standard set forth by the Eleventh Circuit -- the Circuit in which Georgia is located -- in Washington v. Strickland, which requires a habeas petitioner to demonstrate that counsel's ineffectiveness "worked to his actual and substantial disadvantage." 675 F.2d at 1258.

The Georgia standard and the Washington v. Strickland standard are but two of several standards which are applied in determining the adequacy of counsel under the Sixth Amendment.[6/] There is conflict in the Circuits and conflict among the states. Some jurisdictions find counsel's ineffectiveness to violate the Sixth Amendment only if the incompetence rendered the proceedings a "farce and mockery of justice."[7/] The inquiry in other jurisdictions has been whether there was "gross incompetence of counsel which in effect blotted out the essence of a substantial defense,"[8/] whether counsel has exercised the "skill, judgment and diligence of a reasonably competent defense attorney,"[9/] whether the accused was represented by a "reasonably competent attorney acting as a

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[4/] Pitts v. Glass, 231 Ga. 638, 203 S.E.2d 515 (1974).

[5/] MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960), cert. denied, 368 U.S. 877 (1961).

[6/] See Erickson, Standards of Competency for Defense Counsel in a Criminal Case, 17 Am. Cr. L. Rev. 233 (1979).

[7/] See Slayton v. Weinberger, 213 Va. 630, 194 S.E.2d 703 (1974); Erickson, supra at 239 n. 53.

[8/] Johnson v. United States, 413 A.2d 499, 504 (D.C. App. 1980).

[9/] Dyer v. Crisp, 613 F.2d 275, 278 (10th Cir. 1980); State v. Orona, 638 P.2d 1077 (N.M. 1982).

diligent conscientious advocate,"[10] or whether there has been "serious incompetency" that falls "measurably below the performance ordinarily expected of fallible lawyers" that "likely" affected the outcome of the trial.[11]

As noted, this case presents policy questions pertaining to the proper standard for the effective assistance of counsel similar to those presented in Washington v. Strickland. Certiorari should be granted, therefore, to ascertain whether the habeas court and Supreme Court of Georgia applied the proper standard in evaluating counsel's competency under the Sixth Amendment. Yet, a refinement of the question is presented here; that is, does the Eighth Amendment require a more strict standard in assessing counsel's competency in death penalty cases?

The penalty phase of a capital trial is a distinct proceeding where the jury's attention is focused not just upon the circumstances of the crime, but also on "special facts about this defendant that militate against imposing capital punishment." Gregg v. Georgia, 428 U.S. 153, 197 (1976)(Stewart, Stevens, Blackmun, Powell, J.J.). If petitioner's trial counsel cannot be considered ineffective at sentencing under the Georgia standard despite counsel's failure to investigate and present mitigation evidence based upon drug induced psychosis then it would seem appropriate for this Court to establish that in capital cases, the Eighth Amendment, together with the Sixth and Fourteenth, impose a high standard of reasonableness and require that a convicted defendant's counsel be subject to strict scrutiny.

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[10] Cooper v. Fitzharris, 586 F.2d 1325, 1330 (9th Cir. 1978); People v. Roe, 23 Cal.3d 412, 423, 590 P.2d 859, 865, 152 Cal. Rptr. 732, 738 (1979).

[11] United States v. DeCoster, 624 F.2d at 206 (opinion of Leventhal, J.).

Indeed, this heightened scrutiny of defense counsel's services is one of the very conditions under which this Court has allowed capital punishment to be imposed. There is a qualitative difference between death and life imprisonment, and a corresponding difference in the need for reliability in the jury's determination that death is the appropriate punishment in a specific case. Woodson v. North Carolina, 428 U.S. 280 (1976). This necessary reliability is undermined in the absence of a strict and demanding review of defense counsel's performance.

Petitioner's counsel failed to properly investigate and present a defense of insanity on behalf of petitioner based on an organic mental disorder resulting from chronic substance abuse and giving rise to drug induced psychosis at the time of the commission of the charged offenses.

Numerous lay witnesses were presented who testified to petitioner's chronic history of substance abuse of the inhalant Blair in combination with alcohol; the bizarre behavior exhibited at the time of the offense; his lack of recollection of particular events on the date of the offense; prior occasions of irrational behavior while under the influence of inhalants; and behavior evidencing paranoia and delusional thought processes.

For approximately ten years prior to the October 7, 1974 offense, since petitioner was thirteen years of age, he had been inhaling first glue and then a substance called "Blair" on a regular basis (Trial Transcript 1083). Petitioner used Blair for several years prior to the offense on trial and on most days (approximately four out of seven days a week) petitioner was in the habit of sniffing Blair over a ten to eleven hour period each day (Trial Transcript 1084). Petitioner regularly abused the inhalant Blair throughout the day (Trial Transcript 1083-1084). Petitioner, despite his lengthy criminal record, was unable, when asked on cross-examination, to recount one instance of trouble he

had been in other than when he was drinking or sniffing an inhalant (Trial Transcript 1110). The duration of petitioner's disturbances resulting from substance abuse stretched over the ten years preceding the offense of October 7, 1974. Glue, and inhalants generally, are specifically recognized as giving rise to substance use disorders and resultant organic mental disorders. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, Third Edition (Washington, D.C., APA, 1980)(hereinafter "DSM-III") Category 305.9x, p. 179.

Jerry Ray Lane, petitioner's accomplice, testified as a state witness that petitioner was spraying something in a paper bag and sniffing it "...all day, the whole time" on the date of the subject offenses (Trial Transcript 900). Additionally, petitioner was steadily drinking wine and continued inhaling from his paper bag the whole day (Trial Transcript 906, 912, 923). Lane testified that petitioner was "...acting more and more crazy..." as the day wore on (Trial Transcript 919, 925). Lane testified that petitioner, following the offenses didn't know whether he had shot anyone (Trial Transcript 924). Lane testified that petitioner had sniffed inhalants all the time he had known him (six years) and that when he sniffed he would become "...wild and almost irrational sometimes" (Trial Transcript 925-927).

For the defense Mary Stanley testified that she had known the petitioner for twenty-two years and that his mental condition was "...disturbed...insane..." (Trial Transcript 997, 998). Jimmy Stanley, petitioner's step-brother recounted that petitioner had been taken to the emergency room at Kennestone Hospital just prior to the subject offenses due to excessive glue sniffing (Trial Transcript 1018). He concluded that petitioner had a severe mental problem and couldn't always distinguish right from wrong (Trial Transcript 1023-1024). Pat Stanley, petitioner's sister-in-law, recounted an incident two years prior to the subject

offenses when petitioner had become "...wild and glassy eyed..." and pulled a gun in a rage against family members over the setting of the volume on a television (Trial Transcript 1026). She concluded that petitioner was insane at the time of the October 7, 1974 offenses (Trial Transcript 1025).

Ronald Conn confirmed that petitioner started sniffing glue at age thirteen and since then was "...just not doing right... starting acting real crazy..." (Trial Transcript 1034). Conn specifically cited the substance Blair as responsible for the most profound affect on petitioner. Conn testified to observing petitioner on the Wednesday before the October 7, 1974 offense when petitioner was sniffing Blair: "...he was like a wild man,... eyes got wide all the way around them, wild. He looked like the devil." (Trial Transcript 1038). Conn tried to talk to petitioner "...and he didn't even know I was there...keep staring at me, weird" (Trial Transcript 1038). Conn concluded that petitioner's "...mind was gone...", stated that his disturbance lasted for about thirty minutes, that he had a weird look and was suspicious and testified to his opinion that petitioner was "...crazy" (Trial Transcript 1036, 1039-1040).

Mrs. George, petitioner's mother, related petitioner's criminal problems back to the time he started sniffing glue (Trial Transcript 1051). Mrs. George, among other incidents, testified to an incident when she removed car keys from a vehicle petitioner was attempting to drive when abusing drugs. Petitioner "...got wild eyed...lost all control" and broke out the car windows with his hands which bear permanent scars as a result (Trial Transcript 1059-1060). On the Friday before the October 7, 1974 offense Mrs. George found petitioner, who had been sniffing Blair all evening, under the house fearful that people were out to get him (Trial Transcript 1063) and she got help to get petitioner hospitalized (Trial Transcript 1064). Mrs. George

testified that petitioner got into trouble when he was sniffing glue; otherwise, he was "...pretty normal" (Trial Transcript 1067, 1973).

Petitioner testified at the guilt or innocence phase to his history of first glue, then Blair sniffing, stating that he bought Blair whenever he ran out and used it regularly (Trial Transcript 1083-84). On October 7, 1974, petitioner got a can of Blair and drank beer and wine in combination with his abuse of the inhalant (Trial Transcript 1083, 1088). Petitioner continually sniffed Blair during the several burglaries he and Lane committed during the evening hours prior to arriving at the Hooks home (Trial Transcript 1091). Petitioner testified to his difficulty in sorting out his memory of the actual events of the offenses from his memory of prior trial testimony (Trial Transcript 1095).

He remembered seeing Mr. Hooks descending the stairs. He remembered breaking the glass. Next he remembered being at the top of the stairs without any recollection of climbing them. He remembered jerking the phone from the wall and seeing Mr. Hooks sitting up against the wall. He remembered being startled at the sight of the Hooks' son, Steven, and believed the boy to be his cousin. At that time, petitioner remembered seeing Mr. Hooks reach up at him and then the gun going off (Trial Transcript 1095-1097).

The record of petitioner's trial establishes that he was suffering from toxic psychosis at the time of the offenses, which condition resulted from chronic substance abuse over ten years. See also affidavit of Dr. Ronald Wynne. Petitioner's Exhibit No. 1 (Transcript of Procedings of February 14, 1983 before Superior Court Judge Hal Craig (Hereinafter "HCTr.") at pages 9 and 91-94).

Petitioner's trial co-counsel Charles Stephen Cox was primarily responsible for preparation and presentation of the

insanity defense (HCTr. at page 75). Mr. Cox testified that the sole defense at trial on the merits was the one of insanity (HCTr. at page 29). Mr. Cox testified that he was familiar with petitioner's prior collateral attack that counsel at his first trial were ineffective for failing to assert a defense of drug induced insanity (HCTr. at page 29).

Nonetheless, Mr. Cox did not know of, or investigate, the presence of hallucinogenic ingredients in the abused substance Blair (HCTr. at page 34-35). Nor were any experts consulted on effects of chemical substances on the mind (HCTr. at page 35).

Trial counsel did not review scientific literature or research the law of insanity arising from substance abuse (HCTr. at page 35).

Trial counsel arranged for petitioner to undergo an electroencephalogram (Petitioner's Exhibit No. 6, HCTr. at pages 86 and 102-104); yet, counsel failed to consult with the doctor supervising the test and failed to consult a neurological expert as to whether a normal electroencephalogram test result was inconsistent with a drug induced psychosis (HCTr. at page 36).

Trial counsel arranged for petitioner to be psychologically evaluated by Dr. Richard Hark. Mr. Cox acknowledged that he reviewed Dr. Hark's ensuing report carefully in the course of trial preparation (HCTr. at page 52)(The report of Dr. Hark is Petitioner's Exhibit No. 5, HCTr. at pages 70 and 99-101). Dr. Hark's report concluded that petitioner exhibited a "pre-psychotic thought process" which Dr. Hark felt "sure that with the addition of an intoxicant that he could act totally impulsively and without regard to right or wrong." (HCTr. at pages 100-101). Dr. Hark diagnosed petitioner pursuant to DSM-III to be suffering from "alcohol abuse" (305.03); "Hallucinogen abuse (inhalent chemicals)" (305.33); as having an "antisocial personality disorder" (301.70); and a "paranoid personality disorder" (301.00)(HCTr. at page 101).

Despite the foregoing diagnosis petitioner's trial counsel did not investigate the relationship between substance abuse and personality disorders (HCTr. at page 54).

Dr. Hark was not produced to testify at trial (HCTr. at page 9).

At trial on the merits petitioner's counsel put on a defense of insanity, but then refuted it through the testimony of Dr. Hughes. In fact, the insanity defense was effectively recanted by defense counsel in closing argument on the merits.

Dr. Hughes, who testified at petitioner's first trial, did not reexamine petitioner prior to the re-trial. No psychiatrist, or psychopharmacologist or other expert was consulted specifically to evaluate and present a defense of insanity based on substance abuse. Dr. Hughes, in testifying to his expertise, expressed no qualifications in the area of substance abuse. In recounting the psychological tests performed on petitioner, Dr. Hughes did not testify to analysis of petitioner's drug abuse as it related organic mental disorder (Trial Transcript 1144-1147). Only general testimony concerning the effect of drug or alcohol use on self control was elicited (Trial Transcript 1147). Dr. Hughes' opinion of petitioner's personality was that he was a sociopath (Trial Transcript 1158). No specific correlation between substance abuse disorders and the sociopathic personality was drawn, despite recognition of the predisposition of antisocial personality disorders to substance abuse disorders. DSM-III, p. 168.

Far from advancing the defense of insanity by developing and presenting the role of drug abuse in petitioner's mental disorder, counsel completely undermined the effect of the only expert testifying for the defense on the issue of insanity by closing his examination of Dr. Hughes with the following dialogue:

Q: You are not suggesting, are you, that a sociopath is a legally insane person, are you?

A: No, sir. Legally this condition has not been classified as an insanity.

(Trial Transcript 1159)

The expert testimony on the issue of insanity most favorable to the petitioner came upon cross-examination of Dr. Hughes by the State, as follows:

Q: ...Was he under any compulsion of any type that might overpower his will from any of your examinations?

A: His use of controlled substances or drugs was compulsive, and I did not determine positively one way or the other on that. That would be a compulsion; otherwise, I did not find compulsive behavior.

Q: You found none of that?

A: No.

Q: No delusion, no compulsion other than maybe using drugs, and certainly he knew right from wrong during all this period of time and under all your examinations?

A: With the exception, perhaps of the times he was under the influence of drugs.

Q: Unless he was under the influence of drugs.

A: Yes, sir.

Q: Well, that's not uncommon for him or me either.

A: Okay.

Q: Like if I get drunk I might be compulsive.

A: You would at that time, not, perhaps, know right from wrong.

Q: Yes, sir, if I got drunk enough.

A: Yes, sir.

(Trial Transcript 1166-1167)

Petitioner's counsel failed to pursue on redirect examination of Dr. Hughes the probability, or even possibility, that petitioner could not distinguish right from wrong at the time of the offenses. In closing argument, counsel further undermined petitioner's cause, confirming the weakness of the asserted defense and the expert's testimony by stating that the petitioner "...probably wasn't insane." (Trial Transcript 1197).

Recanting the defense, and abdicating the obligations of a zealous advocate, counsel stated, in regard to the evidence of insanity "We told you at the outset we don't know what that evidence shows basically." Counsel mentioned petitioner's inhalation of Blair and drinking but never connected the substance abuse with the defense of insanity.

The pretrial ineffectiveness found in counsels' failure to investigate this defense resulted in counsels' inability to render "informed, professional deliberation" in the selection and presentation of petitioner's defense. Washington v. Strickland, 693 F.2d 1243, 1251 (11th Cir. 1982)(en banc) quoting United States v. Bosch, 584 F.2d 1113, 1122 (1st Cir. 1978).

Where only one plausible line of defense is discernable, as here, "[t]he failure to perform [reasonable substantial] investigation is a clear example of a breach of the duty to investigate." Washington v. Strickland, supra, 693 F.2d at 1252. The Washington decision unambiguously compels granting Mr. Berryhill a new trial here:

> It is obvious that an attorney can no more make a strategic decision that renders unnecessary an investigation of a defendant's one plausible line of defense than he can make a strategic decision to plead guilty against his client's wishes. (citations omitted) Therefore, permissible trial strategy can never include the failure to conduct a reasonable substantial investigation into a defendant's one plausible line of defense. (citations omitted) Id.

This Court should grant certiorari to determine whether the Georgia court's counsel failed to adequately prepare and investigate a defense of drug induced insanity.

Whether petitioner's actions in the charged offenses resulted from voluntary intoxication or from a permanent insanity due to chronic mixed substance abuse (particularly of the inhalant Toluol) was a matter of fact not adequately investigated and presented for resolution by the jury. For an example of an insanity defense based upon abuse of Toluol in a jurisdiction with provisions of law regarding the M'Naghten test, delusional compulsion test and voluntary intoxication as applicable to Georgia criminal trials, see Pierce v. Turner, 402 F.2d 109 (10th Cir. 1968), cert. denied, 394 U.S. 950 (1969). See also Pierce v. Turner, 276 F.Supp. 289, 296 (D.Utah 1967) as footnote 17 therein particularly describes the effects of the inhalant abused in this case.

By failing to gather and then present before the jury facts concerning the petitioner's chronic abuse of the hallucinogen Toluol, trial counsel denied petitioner the opportunity to have the jury consider the one plausible line of defense.

Certainly, effective assistance of counsel required preparation and presentation of the effects of the inhalant as the resulting impairment constituted evidence to negate specific intent. See United States v. Romano, 482 F.2d 1183, 1196 (5th Cir.(Ga.) 1973), cert. denied, 414 U.S. 1129; Massey v. State, 222 Ga. 143, 149, 149 S.E.2d 118, cert. denied, 385 U.S. 36 (1966). See also, Cochran v. State, 136 Ga.App. 125, 126, 220 S.E.2d 477 (1975).

Petitioner was convicted of armed robbery and thereupon felony murder. Proof of the elements of the offense of felony murder necessarily requires proof of the elements of the predicate felony. Woods v. State, 233 Ga. 495, 501, 212 S.E.2d

322 (1975); Atkins v. Hopper, 234 Ga. 330, 216 S.E.2d 89 (1975). Absent proof beyond a reasonable doubt of the specific intent to commit theft, petitioner's convictions must fall.

Counsel for petitioner, despite the prior notice by experts and by a prior decision in petitioner's collateral attack upon his first trial failed to investigate evidence of the effects of Toluol on his mental state at the time of the offenses charged. Counsel failed not only to provide the jury with the guidance of expert testimony on the subject of Toluol abuse, but also failed in argument to correlate the chronic drug abuse with the defense of insanity and lack of specific intent.

For counsel to have presented an insanity defense through an expert and to have elicited testimony from that expert that petitioner was not insane and then to have equivocated about, if not abandoned, the insanity defense in closing argument denied petitioner effective assistance of counsel. United States v. Fesell, 531 F.2d 1275, 1278 (5th Cir. 1976)(failure of counsel to investigate and present insanity defense denied minimally effective representation guaranteed by the Sixth Amendment).

Counsel failed to investigate the facts of Toluol abuse (mixed with alcohol abuse) and failed to obtain expert services directed toward substance abuse. Counsel failed to develop a legal defense, the only plausible defense, around the mental impairment suffered by petitioner.

The foregoing lapses resulted from inadequate investigation of facts and law. Counsel cannot seriously claim any tactical or strategic rationale for failing to investigate and present the defenses here set forth since the defense case, including the testimony of petitioner presented the jury with the facts of drug abuse by petitioner.

While petitioner submits that the law is unsettled regarding a showing of actual prejudice especially as he was denied his one

plausible line of defense and counsel failed to investigate the leads upon which it was based (See Hamilton v. State of Alabama, 368 U.S. 52, 55 (1961); Davis v. State of Alabama, 596 F.2d 1214 (5th Cir. 1980) prejudice is clear upon the record of counsel's failure to advance the one plausible line of defense where the facts in the record plainly support the defense. Here petitioner suffered actual and substantial disadvantage to the course of his defense. Washington v. Strickland, supra, 693 F.2d at 1262.

Petitioner's trial counsel, Mr. Cox, acknowledged that he and his co-counsel, Mr. Neal, felt that they did not have a "strict" defense of insanity; that they hoped to evoke "sympathy" from the jury and to use the insanity evidence from the merits phase to "start laying some foundation or groundwork for mitigation" (HCTr. at page 38).

However, no experts or other testimony on petitioner's insanity was adduced at the sentencing phase of the trial. Nor was the jury called upon in argument at the sentencing phase to examine petitioner's drug abuse and the offenses resulting therefrom as mitigation in light of the changes in his life since the incident.

In failing to advance petitioner's organic mental disorder and drug induced psychosis at the time of the offenses as mitigating evidence at the sentencing phase, counsel deprived petitioner of effective assistance of counsel. Blake v. Zant, 513 F.Supp. 772 (S.D.Georgia 1981). The error is more egregious at the sentencing phase as the prospects for rehabilitation of a person whose character is altered by drugs through the removal of the drug addiction is a compelling argument for a life sentence instead of the penalty of death. Failure to address the jury's attention to the mental impairment suffered by petitioner, and to support the argument with expert testimony, and to seek specific instructions as to this specific area of mitigation

deprived petitioner of a fair hearing on the issue of punishment.

Petitioner contends this failure denied him reasonably effective assistance of counsel at a crucial phase of the trial. The courts below failed to specifically address this issue in its conclusions of law.

In sum, petitioner's jury was not provided with any information whatsoever concerning the correlation between the evidence of insanity resulting from drug induced psychosis at either phase of his capital trial.

This Court should review this case to decide the measure of counsel's competence in a capital case, and the constitutionally required standard for deciding claims of ineffective assistance of counsel.

CONCLUSION

For the reasons stated herein, Michael Gene Berryhill requests that a writ of certiorari issue to review the decision of the Court below.

Respectfully submitted,

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Michael Gene Berryhill

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

MICHAEL GENE BERRYHILL, PETITIONER VS. ROBERT O. FRANCIS, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER, RESPONDENT	:	HABEAS CORPUS FILE NO. 5820

O R D E R

This habeas corpus challenges the constitutionality of Petitioner's restraint and the imposition of the death penalty by the Superior Court of Bartow County. Petitioner was convicted of felony murder and armed robbery. He received a death sentence for the felony murder and a life sentence for the armed robbery. Petitioner's convictions and sentences were affirmed by the Supreme Court. Berryhill v. State, 235 Ga. 549 (1975), cert. denied 429 U.S. 1054, 97 S.Ct. 769, 50 L.Ed.2d 771 (1977). The Butts Superior Court denied habeas corpus relief; the Supreme Court affirmed the felony murder conviction and death sentence but vacated the armed robbery conviction as a lesser included offense of the felony murder. Berryhill v. Ricketts, 242 Ga. 447 (1978), cert. denied 441 U.S. 967, 99 S.Ct. 2418, 60 L.Ed.2d 1073 (1979). The United States District Court for the Northern District of Georgia granted habeas corpus relief on May 13, 1980, reversing Petitioner's conviction and sentence.

Upon retrial in the Bartow Superior Court, Petitioner was convicted of felony murder and armed robbery and was sentenced to death. His conviction and sentence were affirmed by the Supreme Court. Berryhill v. State, 249 Ga. 442 (1982). Certiorari was denied by the Supreme Court of the United States. Berryhill v. Georgia, ___ U.S. ____ S.Ct.____, 74 L.Ed.2d 293 (1982).

The petition as amended contains 69 numbered paragraphs, of which 52 allege substantive claims for relief (18-68G). The Court will address these claims for relief by paragraphs corresponding numerically to the paragraphs in the petition.

The record in this case consists of the transcript of proceedings before this Court on February 14, 1983; the affidavits of Ronald D. Wynne, Ph.D., and Albert M. Pearson; and the record and transcript of Petitioner's retrial in the Bartow Superior Court.

18-20

In paragraphs 18-20, Petitioner alleges that he was denied effective assistance of counsel in violation of his Sixth, Eighth, and Fourteenth Amendment rights and rights under the Georgia Constitution.

FINDINGS OF FACT

Petitioner was represented at trial and on appeal by C. Stephen Cox and William A. Neel, Jr. (H.T. 13;23). Mr. Cox was appointed to represent Petitioner on April 8, 1981. (H.T. 13). His request for assistance resulted in the appointment of Mr. Neel on April 16, 1981. Id. They served

as co-counsel. (H.T. 13-14).

Mr. Cox graduated from the University of Georgia School of Law in 1976 and was admitted to the Georgia Bar that same year. (H.T. 12). He clerked for one year and four months prior to entering private practice. Id. Since December 1982 he has been with the District Attorney's Office. Id. Mr. Cox estimated that while a private practitioner, 35 to 50 per cent of his general practice was in criminal law. Id. He had defended 3 murder cases prior to Petitioner's trial, one of which involved an insanity defense. (H.T. 13).

Mr. Neel graduated from Samford University School of Law in 1979 and that same year was admitted to the Georgia Bar. (H.T. 72). Since that time he has been in private practice, estimating that 30 per cent of his practice was criminal work. Id. He had tried one murder case prior to Petitioner's. Id.

Counsel were appointed 33 days prior to the original trial date, May 11th (H.T. 25). They sought a continuance, but the trial court was reluctant to grant one. (H.T. 28). They did not know until May 6th, when the trial court granted the plea in abatement, that they would not go to trial on May 11th. (H.T. 26). Counsel testified that they felt pressured by the time constraints, but that did not keep them from doing a good job in preparing for trial. (H.T. 29, 62, 81).

Counsel basically followed the Unified Appeal Procedure checklist. (H.T. 14). They filed numerous

pretrial motions. (H.T. II 16-26, 30-73, 76-97, 209-241, 283-286). Of these motions Counsel considered to be most important the challenge to the composition of the grand jury that indicted Petitioner in 1974 and the motion for change of venue. (H.T. 76). Mr. Neel handled the grand jury challenge while Mr. Cox pursued the change of venue motion. (H.T. 26). Counsel prevailed on the grand jury challenge but were not successful in challenging the grand jury that re-indicted Petitioner and the array of petit jurors. (H.T. 25-26). The change of venue motion was also denied. Id. In preparing that motion, Mr. Cox had gathered from the county newspaper all articles from the date of the offense to the time of the second trial which referred to Petitioner and incorporated these 24 to 26 articles into the venue motion. (H.T. 15-16). He also attempted to incorporate into the motion a public opinion poll to corroborate community prejudice but was not successful. Id.

Counsel's main theory of defense was first to get a change of venue. (H.T. 18-19). Failing that, Counsel felt the only thing they had was an insanity type defense. Id. They were aware this defense was not successful at Petitioner's first trial but hoped to make a good impression for the sentencing phase and show enough mitigation to get a life sentence. Id.

In preparing the insanity defense, Mr. Neel talked with the attorneys who had represented Petitioner at this original trial about their efforts to establish an insanity defense. (H.T. 30, 73). Mr. Neel discussed with Mr. Bradshaw Petitioner's use of drugs, specifically the substance Blair,

and Mr. Bradshaw's research into that area. (H.T. 73-75). Since medical tests had not been previously run on Petitioner, Counsel looked into the possibility of brain damage and arranged for an electroencephalogram (EEG) to be conducted as well as a psychological evaluation. (H.T. 19-20, 73-75). Counsel did not rule out a drug-induced insanity defense because of their conversations with Mr. Bradshaw; rather, they hoped to build a defense based upon the information from the EEG and psychological evaluation. (H.T. 82).

Counsel tried to follow all leads from the psychologists but wound up presenting a rather traditional insanity defense based on the data they were given. (H.T. 37, 55-56). The EEG results were normal and were not admitted at trial. (H.T. 22). Counsel did not call the psychologist who evaluated Petitioner, Dr. Hark, because they thought his report would be damaging to Petitioner. (H.T. 21, 56). Counsel did call Dr. Hughes, a psychologist who had seen Petitioner while Petitioner was a teenager and who had examined him after he was arrested in 1974. (H.T. 20). Counsel did not preclude a drug-induced insanity defense but felt there was nothing to point toward such a defense because of the normal EEG results and the psychologists' reports wherein Petitioner was found to have known right from wrong at the time of the offense and was under no delusional compulsion. (H.T. 37, 40, 55). Counsel did present evidence of Petitioner's substance abuse through family members and friends (H.T. 39-40, 65) as well as Petitioner himself. (H.T. 38).

Counsel's strategy at the sentencing phase was to show

that Petitioner was off drugs and how he had changed his life. (H.T. 59-60). Counsel talked with Petitioner, obtained a list of potential witnesses, and consulted with them. (H.T. 22-23, 79-80). Counsel presented eight witnesses at the sentencing phase as well as Petitioner himself. (H.T. 59-60, 78-79).

At trial Counsel conducted an extensive voir dire (T. II 10-804); gave opening argument (T. II 838-840); cross-examined State witnesses (T. II 857; 873; 886; 892; 917; 928; 936; 945; 963; 972; 976; 978; 982; 986); presented six witnesses in the guilt/innocence phase (T. II 988; 999; 1024; 1032; 1048; 1143) as well as Petitioner (T. II 1080); gave closing argument in the guilt/innocence phase (T. II 1194-1213); gave opening argument in the sentencing phase (T. II 1307-1311); presented eight witnesses in the sentencing phase (T. II 1326; 1334; 1341; 1347; 1360; 1373; 1380; 1386) as well as Petitioner (T. II 1396); and gave closing argument in the sentencing phase (T. II 1429-1446).

CONCLUSIONS OF LAW

The Sixth Amendment right to counsel means "...not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960); Pitts v. Glass, 231 Ga. 638 (1974); Fortson v. State, 240 Ga. 5 (1977).

Counsel here easily meet the test. They were experienced in the trial of criminal cases. They prepared for and vigorously represented Petitioner's cause at his retrial. The effort they put forth was certainly reasonably effective within the meaning of the standard.

Petitioner has claimed that Counsel were ineffective

for not properly investigating and preparing an insanity defense. Specifically, he alleges that Counsel were ineffective for failing to have an expert witness testify as to Petitioner's substance abuse. To support this claim Petitioner has presented the affidavit of Dr. Ronald D. Wynne wherein Dr. Wynne outlines the steps that should have been taken for a "proper" evaluation and presentation of the insanity defense. However, this kind of opinion evidence constitutes the kind of hindsight which has never provided the basis for ineffective assistance claims.

Here, Counsel discussed the insanity defense with the attorneys who represented Petitioner at his first trial. Counsel arranged for an EEG and psychological examination of Petitioner. They testified that they tried to follow all leads provided by the psychologists. Counsel did not rule out a drug-induced insanity defense but found nothing to point toward such a defense. They did present evidence of Petitioner's substance abuse through Petitioner, family members, and friends. Counsel clearly conducted a substantial investigation into what they concluded was the one plausible line of defense. The Court concludes that Counsel rendered reasonably effective assistance within the meaning of the standard. Washington v. Strickland, 693 F. 2d 1243, 1253 (Former 5th Cir. 1982). Effectiveness is not measured by how another lawyer may have handled the case. Estes v. Perkins, 225 Ga. 268 (1968).

Petitioner contends that Counsel failed to advance the defenses of drug-induced psychosis and drug-induced organic brain damage. Counsel questioned Dr. Robert Hughes

extensively as to evidence of possible brain damage and delusions. (T. 1154-1157). The testimony was negative and Counsel abandoned the effort after an affirmation of Petitioner's severe emotional disturbance. (T. 1159). A condition which is not permanent, brought about by the voluntary act of the accused is no defense to a crime. Peek v. State, 155 Ga. 49, 51 (1923); Strickland v. State, 137 Ga. 115, 116 (1911). If the Petitioner committed the crime while under the influence of drugs, this would be no defense unless the condition producing his behavior were permanent. Peek v. State, 155 Ga. 49, 52 (1923). Even if the mania or insanity were permanent and fixed, the person would be considered not responsible only if the infirmities destroyed all knowledge of right and wrong. Peek v. State, 155 Ga. 49, 50 (1923); Strickland v. State, 137 Ga. 115, 116 (1911); Beck v. State, 76 Ga. 452, 470 (1886).

Evidence was presented on both sides of the issues of permanent insanity and drug-induced organic brain damage. (T. 925-927, 1027, 1038, 1045, 1067, 1073, 1154-56). The defense presented a case of emotional disturbances and extended drug addiction in an attempt to reflect on the abilities of the accused to know right from wrong. The prosecution countered with evidence of a sane person who was voluntarily under the influence of drugs. The facts and circumstances in this case would authorize the jury to find for one theory over the other.

When inadequate representation is alleged, the critical factual inquiry ordinarily relates to whether the defendant had a defense which was not presented; whether trial counsel

consulted sufficiently with the accused, and adequately investigated the facts and the law; whether omissions charged to trial counsel resulted from inadequate preparation rather than from unwise choices of trial tactics and strategy. Hawes v. State, 240 Ga. 327 (1977). In this case, all defenses were brought before the jurors. They were charged on specific intent (T. 1275-1276), criminal intent (T. 1276-1277), lack on mental capacity (T. 1276), insanity (T. 1277-1278) and permanent insanity resulting from drug use (T. 1280). All of the points were covered in the closing argument by Counsel. For this reason, the Court does not view Counsel as ineffective.

Petitioner has also claimed Counsel were ineffective for not objecting to the State's introduction of evidence of other crimes during cross-examination of Petitioner when Petitioner allegedly had not put his character in issue. Prior to being cross-examined, Petitioner as part of his defense introduced evidence of his prior criminal record. (T. II, 1103). Pretermitting waiver in that Counsel did not object, the Supreme Court found no error. Berryhill v. State, 249 Ga. at 451(13). The Court does not find Counsel ineffective for this reason.

Petitioner has also alleged Counsel were ineffective for failing to request a mistrial or object to insufficient curative instructions when the prosecutor asked Petitioner about his employment history and commented thereupon. Contrary to Petitioner's assertion, the Supreme Court has concluded that the prosecutor's remarks were not so prejudicial as to be incurable by instructions. Berryhill v. State, 249 Ga. at 451(14). For this reason the Court does not view Counsel as ineffective.

Petitioner has also contended that Counsel were ineffective for failing to ask for curative instructions when the prosecutor asked Petitioner about his prior criminal record on cross-examination. In that the Supreme Court has found no error in this regard, the Court cannot find Counsel ineffective for failing to ask for curative instructions.

Finally, Petitioner has alleged Counsel were ineffective for failing to object to the prosecutor's closing argument in the sentencing phase. [In that the Court has concluded the prosecutor's argument was not improper (see paragraphs 40-43 below), the Court cannot find Counsel ineffective for this reason.]

Accordingly, the claim for relief in paragraphs 18-20 is found to be without merit.

21-27

In paragraphs 21-27, Petitioner claims that the trial court's failure to grant a change of venue violated his right to a fair trial by an impartial jury under the Sixth, Eighth, and Fourteenth Amendments and the Georgia Constitution.

FINDINGS OF FACT

The Supreme Court has already concluded that the trial court did not abuse its discretion in denying the motion for a change of venue. Berryhill v. State, 249 Ga. at 443(2).

CONCLUSIONS OF LAW

Findings of the Supreme Court are binding upon this Court for the purposes of review. Elrod v. Ault, 231 Ga. 750 (1974); Brown v. Ricketts, 233 Ga. 809 (1975).

Accordingly, the allegation in paragraphs 21-27 is found to be without merit.

28-32

In paragraphs 28-32, Petitioner contends he was denied his right to a representative jury and to a fair trial by an impartial jury due to the jury selection procedures in Bartow County and the conduct of voir dire at his retrial.

The Supreme Court has already concluded that the trial court was authorized to overrule Petitioner's challenge to the traverse jury based on the percentage of women, Berryhill v. State, 249 Ga. at 445(3); that the trial court did not err in not striking a veniremen for cause, Berryhill, supra, at 446(4); that the trial court did not impermissibly limit the scope of voir dire, Berryhill, supra, at 448(5); and that the trial court did not err in refusing to permit sequestered voir dire, Berryhill, supra, at 449(7).

Accordingly, this claim for relief is found to be without merit.

33

The Supreme Court has found no error in the trial court's denial of defense counsel's request to make his opening statement at the conclusion of the state's case. Berryhill v. State, 249 Ga. at 448(6).

34-35

The Supreme Court has already concluded that Petitioner's Fifth and Sixth Amendment rights were not violated by the introduction of his statements to Tex Fuller in a filmed interview. Berryhill v. State, 249 Ga. at 449(10).

36-38

The Supreme Court has concluded there was no error

by the trial court in excluding in the guilt/innocence phase the opinion of Petitioner's aunt as to his early childhood mental condition. Berryhill v. State, 249 Ga. at 449(9).

39

The Supreme Court has already decided the issue of alleged prosecutorial misconduct adversely to Petitioner. Berryhill v. State, 249 Ga. at 451(13) and (14).

40-43

In paragraphs 40-43, Petitioner contends that the prosecutor's closing argument in the sentencing phase violated his constitutional rights.

FINDINGS OF FACT

The Court has reviewed the closing argument of the prosecutor in the sentencing phase. (T. 1411-1429).

CONCLUSIONS OF LAW

To prevail in a state habeas case, the misconduct of the prosecutor must be so egregious as to render the trial fundamentally unfair. Hance v. Zant, 696 F.2d 940, 950 (1983). It is not sufficient that the comments made were improper, the asserted error must be one of constitutional magnitude. Id. This determination should be made by considering the totality of the circumstances. The prosecutor's conduct should be evaluated in the context of the entire trial. Id.; Houston v. Estelle, 569 F.2d 372, 377.

In determining misconduct during the sentencing phase of the trial, several factors must be considered. First

is the degree to which the comments objected to would mislead the jurors and prejudice the accused. Second is whether the comments were isolated or extensive, and finally whether they were deliberately or accidentally placed before the jury. Hance v. Zant, 696 F.2d at 950 N.7.

Here, Petitioner alleges misconduct on the part of the prosecution in that the prosecutor used a comment made during the documentary film, which was presented into evidence, to incite fear in the jurors. While a prosecutor should not make an extended appeal to the fears and emotions of an already aroused jury (Hance v. Zant, 696 F.2d at 951), this situation is different. A prosecutor may argue inferences that could be drawn from the facts already in evidence. Wheeler v. State, 220 Ga. 535, 537 (1965); Shy v. State, 234 Ga. 816, 824 (1975); Garcia v. State, 240 Ga. 796, 800 (1978). Where the language complained of introduces no new facts, but is merely a forceful though possibly extravagant method of impressing on the jury the magnitude of the offense and the solemnity of the duty of the jurors no error is shown. Leutner v. State, 235 Ga. 77, 84 (1975).

Petitioner also alleges misconduct in the prosecutor's comments relating to the appropriateness of the death penalty. Specifically the Petitioner attacks statements made about the Atlanta murders, the Biblical support for the death penalty and the duty to maintain community safety. The Supreme Court has ruled that a prosecutor may urge severe punishment during the sentencing phase. Bailey v. State, 153 Ga. 413(4)(1922). In arguing for the death penalty he may offer plausible reasons for his position. Allen v. State,

187 Ga. 178, 182 (1938); Strickland v. State, 209 Ga. 675(2)(1953). Protection of the community is one consideration a jury is entitled to entertain in determining an appropriate sentence. As such, it may be argued by the prosecution during the sentencing stage, even though such an argument would have been objectionable during the guilt determination stage. Hamilton v. State, 131 Ga. App. 69, 70 (1974). The Supreme Court found in the review of the first trial of the accused that appeals to convict for the safety of the community have been upheld at least by inference in Hart v. State, 227 Ga. 171 (179 S.E.2d 346) (1971) and Bryant v. Caldwell, 484 F.2d 65, 66 (1973) cert. den. 415 U.S. 981 (1974). Berryhill v. State, 235 Ga. 549, 552 (1975).

Petitioner also alleges that the prosecutor invoked the experience of his office to improperly vouch for the accused's malingering and improperly commented on the Petitioner's use of the time elapsed since the first trial. The Petitioner further contends that the prosecutor called upon the jury to go without the record and draw on their readings from newspapers in making their decision regarding the insanity defense. In reviewing the prosecutor's closing arguments, the comments made appear to be general argument rather than a personal opinion on the specific activities of the Petitioner. The statement about newspapers was a drawing on the experiences of the jurors, not a call to base their decision on articles about this specific case. A prosecuting attorney is not bound to confine his comments solely to the evidence and the Court's instruction. Flights of oratory and figurative speech are not improper. Wheeler

v. State, 220 Ga. 535, 537 (1965).

The Supreme Court recently ruled that neither the Eighth Amendment nor O.C.G.A. §17-10-35(c)(1) forbids a death penalty based in part on an emotional response to factors in evidence which implicate valid penalogical justifications for the impositions of the death penalty. Per force argument by the prosecutor which 'dramatically appeals' to such legitimate emotional response is not 'constitutionally intolerable'. Conner v. State, ___ Ga. ___, 2 F.C.D.R. #77, No. 39325 (May 24, 1983).

In this case, even though some of the comments made by the prosecutor may have been inflammatory, considering the strength of the state's case, the Court cannot find that the prosecutor's conduct rendered the sentencing phase of the trial fundamentally unfair.

Accordingly, the claim for relief in paragraphs 40-43 is found to be without merit.

44-48

The Supreme Court has found no error in the trial court allowing the jury to hear the replay of testimony. Berryhill v. State, 249 Ga. at 450(11).

49-53

The Supreme Court has already decided the issue of the alleged jury deadlock adversely to Petitioner. Berryhill v. State, 249 Ga. at 451(12).

54-58

In paragraphs 54-58, Petitioner claims he was denied his right to a fair trial under the Sixth and Fourteenth Amendments by the trial court's conduct of the trial.

FINDINGS OF FACT

The Supreme Court has already ruled that the cumulative effect of all errors alleged on direct appeal did not deny Petitioner a fair trial. Berryhill v. State, 249 Ga. at 452(16). The Supreme Court has also decided adversely to Petitioner the issues of the denial of a general motion for funds, Id. at 452(15); the refusal to permit sequestered voir dire, Id. at 449(7); the scope of voir dire, Id., at 448(5); the limiting of the testimony of Petitioner's aunt, Id., at 449(9); and the allegedly deadlocked jury, Id., at 451(12).

After the jury returned its verdict in the sentencing phase and a poll of the jury was taken, the trial court thanked the jury for its service. (T.T. 1511-1514). During those remarks the trial court told the jury that if they had given Petitioner a life sentence, he would have been eligible for parole in November of that year. Id. Counsel requested, in lieu of the comment about parole, that the trial court tell the jury what the average length of service is in Georgia on a murder conviction. (T.T. 1514). The trial court did so. (T.T. 1515).

CONCLUSIONS OF LAW

Petitioner has alleged that the trial court's comment about parole reveals the trial court's prejudice against Petitioner. The trial court did not violate O.C.G.A. §17-8-76 (Code Ann. §27-2206), the Code section prohibiting in the presence of the jury references to the possibility of parole. Here, the jury's deliberations had ended, so there was no possibility that the comment might have influenced the jury away from a recommendation of mercy.

Compare McGruder v. State, 213 Ga. 259, 266 (1957), with Tucker v. State, 244 Ga. 721, 730 (1979).

Further, the trial court did not by his comment express approval of the jury's verdict. See O.C.G.A. §§17-9-22 and 17-19-23 (Code Ann. §110-201 et seq.). If the trial court had expressed an opinion as to the jury's verdict, the penalty would be the disqualification of the trial judge from presiding in the case if a new trial were granted, not the reversal of Petitioner's death sentence. Johnson v. State, 46 Ga. App. 494 (1933).

The trial court did not act improperly. Accordingly, the claim for relief in paragraphs 54-58 is found to be without merit.

59-65

The issue of the denial of the general motion for funds has already been decided adversely to Petitioner. Berryhill v. State, 249 Ga. at 452(15).

66-68

Petitioner's challenge to electrocution as the means of execution is without merit. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); Johnson v. State, 249 Ga. 812, 819 (1982).

68A-68G

In paragraph 68A-68G, Petitioner claims that the charge to the jury concerning mitigating circumstances was constitutionally inadequate.

FINDINGS OF FACT

The Court has reviewed the instructions to the jury in the sentencing phase of trial. (T. 1486-1491).

CONCLUSIONS OF LAW

Mitigating circumstances are not required by Georgia law to be singled out in the charge to the jury. Thomas v. State, 240 Ga. 393(4)(1977); Collier v. State, 244 Ga. 553, 569 (1979).

Here, the trial court explicitly instructed the jury as to mitigating circumstances and the option to recommend against death even if aggravating circumstances were found to exist. The charge as given comports with Spivey v. Zant, 661 F.2d 464 (Former 5th Cir. 1981), cert. denied ____ U.S. ____, ____S.CT.____, 73 L.Ed.2d 1374 (1982).

Accordingly, this claim for relief is found to be without merit.

WHEREFORE, all claims for relief having been found to be without merit, the petition is hereby denied.

SO ORDERED, this 3rd day of August, 1983.

Hal Craig

HAL CRAIG
JUDGE, SUPERIOR COURTS
FLINT JUDICIAL CIRCUIT

SUPREME COURT OF GEORGIA

ATLANTA, September 28, 1983

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

MICHAEL GENE BERRYHILL V. ROBERT FRANCIS, WARDEN

Upon consideration of the application for a certificate of probable cause to appeal filed in this case, it is ordered that it be hereby denied. All the Justices concur, except Hill, C.J., dissents.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Joline B. Williams Clerk.

APPENDIX B

SUPREME COURT OF GEORGIA

ATLANTA, October 18, 1983

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

MICHAEL GENE BERRYHILL V. ROBERT FRANCIS, WARDEN

Upon consideration of the Motion for Reconsideration filed in this application, it is ordered that it be hereby denied. All the Justices concur, except Hill, C.J., dissents.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Hazel E. Hallford, Deputy Clerk

APPENDIX C

No. 83-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

MICHAEL GENE BERRYHILL,

Petitioner,

vs.

ROBERT FRANCIS, Warden,
Georgia Diagnostic and
Classification Center

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Petition For Writ of Certiorari has been mailed, postage prepaid, to Susan Boleyn, Assistant Attorney General, 132 State Judicial Building, 40 Capital Square, S. W., Atlanta, Georgia 30334 this 13th day of January, 1984.

STEPHEN G. MILLIKEN #254433
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511 E Street, N.W.
Washington, D.C. 20001
(202)393-7676

Attorney for Petitioner

No. 83-6090

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

MICHAEL GENE BERRYHILL,

Petitioner,

vs.

ROBERT FRANCIS, Warden,
Georgia Diagnostic and
Classification Center

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

Comes now the Petitioner Michael Gene Berryhill and respectfully requests this Honorable Court to allow him to proceed without prepayment of costs for the reason that petitioner is indigent, and for years has been so. See attached affidavit (Exhibit A) presented to the Superior Court of Butts County and the Georgia Supreme Court below, where petitioner was permitted to proceed in forma pauperis.

Respectfully submitted,

STEPHEN G. MILLIKEN #254433
Milliken & Van Susteren, P.C.
511 E Street, N.W.
Washington, D.C. 20001
(202)393-7676

Counsel for Petitioner

EXHIBIT A

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

MICHAEL GENE BERRYHILL, Petitioner, -v- ROBERT FRANCIS, Warden, Georgia Diagnostic and Classification Center, Respondent.	HABEAS CORPUS NO. _____

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, MICHAEL GENE BERRYHILL, being first duly sworn, depose and say that I am the Petitioner in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? Yes_____ No ✓

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. 1972 $100.00 mth.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? Yes_____ No ✓

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account?

Yes_____ No ✓

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes_____ No ✓

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons. None ✓

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Michael Gene Berryhill

MICHAEL GENE BERRYHILL

STATE OF GEORGIA

COUNTY OF _____

SUBSCRIBED AND SWORN TO

before me this the 7 day of October, 1982

Notary Public

My Commission expires:

9-20-83

No. 83-6090

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

MICHAEL GENE BERRYHILL,

Petitioner,

vs.

ROBERT FRANCIS, Warden,
Georgia Diagnostic and
Classification Center,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Motion to Proceed in Forma Pauperis has been mailed, postage prepaid, to Susan Boleyn, Staff Assistant Attorney General, 132 State Judicial Building, 40 Capital Square, S. W., Atlanta, Georgia 30334 this 13th day of January, 1984.

STEPHEN G. MILLIKEN #254433
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511 E Street, N.W.
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(202)393-7676

Attorney for Petitioner